IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO. 4 OF 2005
IN
SECOND APPEAL NO. 1134 OF 2004

Shri Genba Sahadu Modak
since deceased through his legal heir
Subhash Genba Modak & ors. ... Petitioners

V/s

Shri Suryakant Vitthal Modak & ors. ... Respondets

ALONGWITH

REVIEW PETITION NO. 5 OF 2005
IN
SECOND APPEAL NO. 1135 OF 2004

Shri Genba Sahadu Modak
since deceased through his
legal heir
Subhash Genba Modak & ors. ... Petitioners

V/s

Shri Suryakant Vitthal Modak
& ors. ... Respondents

Mr. A.V.Anturkar for the petitioners.

CORAM: P.V. KAKADE, J.

DATED: 14TH OCT., 2005

ORAL JUDGMENT:

1. Both these review petitions are being disposed of by

this common judgment.

2. Heard learned counsel for the petitioners in both petitions. Perused the record.

3. The petitioner Genba in both review petitions is the original plaintiff in Regular Civil Suit No. 897 of 1990 for partition and separate possession, and original defendant in Regular Civil Suit No. 1481 of 1988. Both suits were decreed by the Trial Court.

The civil appeal was preferred by the original defendants against the order passed in R.C.S. No.897 of 1990 (wherein present petitioner Genba was the respondent) bearing Civil Appeal No. 630 of 2000 came to be allowed by order dated 12.3.2002 of the Ad-hoc Dist. Judge, Pune, and against the lower appellate Court’s order Second Appeal No. 1134 of 2004 was filed.

Another civil appeal was preferred by the original defendants against the order passed in R.C.S. No. 1481 of 1988 (wherein present petitioner Genba was the appellant) bearing Civil appeal No. 627 of 2000 which came to be dismissed against which the Second Appeal No. 1135 of 2004 was filed.

4. In the course of the argument advanced at the stage of admission of the second appeals, the only point which was raised was the alleged non-compliance of the provision of Order 41 Rule 31 of the C.P.C. by the lower appellate Court when the point for determination was framed as follows:-

> "Whether the judgment and decree passed by the Trial Court is legal, proper and correct ?"

The said point for determination was answered in the negative and both second appeals came to be dismissed with costs vide order dated 1.12.2004 and hence the present review petitions are filed.

5. Mr. Anturkar, the learned counsel for the appellants vehemently urged in those appeals that it was obligatory on the part of the lower appellate court to formulate points for determination on the basis of pleadings and evidence on record as contemplated under Order 41 Rule 31 of the C.P.C. and, therefore, appeals deserved to be admitted on that count alone. He sought to put reliance on two rulings of Single Judges of this

Court, namely, in the case of **Smt. Anita BM Barreto v/s Abdul Wahid Sanaullah, reported in A.I.R. 1985 Bom. 98,** and **Janardan Nago Patil v/s Ramanand Ramdas Mishra, reported in 2003 (4) Mh.L.J. 853.** The latter judgment was given relying on the earlier judgment in the case of **Smt. Anita BM Barreto (Supra).** On perusal of the ratio laid down by both judgments, I concluded that the facts involved in the said two judgments relied upon by the appellants differ from the facts involved in the said appeals. In **Smt. Anita's case (Supra)** or **Janardan's case (Supra),** it was observed that, perusal of the judgment made it clear that the first appellate Court had not applied its mind to the evidence and had not recorded its decision on the facts urged before it. However, I was of the view that it was not the case in the present appeals. On the other hand, it was seen that the lower appellate Court has not only taken up each and every disputed fact into consideration, discussed it and has appreciated it properly which left no doubt that he had applied his mind to the facts and legal aspects involved in the case and, therefore, I was inclined to hold that no prejudice was caused to the appellants and on that count the order of the lower Court need not and could not be set aside only because technical compliance of Order 41 Rule 31 of C.P.C. was

not made. In other words, it was held that non-compliance of the said provision in the light of the aforesaid aspects would amount to mere irregularity which would not vitiate the proceeding and with these observations appeals were dismissed.

6. Now the review petition is filed on the ground of observations made by the Supreme Court in the case of **Lakshmi Ram Bhuyan v/s Hari Prasad Bhuyan & ors., reported in (2003) 1 SCC 197.** It is observed by the Apex Court that Order 41 Rule 31 of C.P.C. casts an obligation on the author of the appellate judgment to state the points for determination, the decision thereon, the reasons for the decision and when the decree appealed from is reversed or varied, the relief to which the appellant is entitled. Therefore, it was submitted by Mr. Anturkar, learned counsel for the petitioners that, it was mandatory on the part of the lower appellate Court to formulate distinct and clear points for determination which would be self-sufficient to reflect the nature of the dispute and findings thereon.

The petitions further show that review is also sought on the ground that two judgments of this Court of Single

Judges are contrary to the view taken by this Court which cannot be allowed and it would have been proper to refer the issue to the larger Bench if this Court wanted to differ from the ratio laid down by the Single Judges of this Court referred to earlier. In other words, it was said that, if this Court wanted to take contradictory view to the earlier view of the single Judges, then the issue should have been referred to the larger Bench.

7. I have given my anxious consideration to all these submissions. At the outset, it may be noted that, there is absolutely no reason for referring the issue involved to the larger Bench plainly due to the reason that I have not taken any contradictory view to the view taken by the Single Judges in the case of Smt. Anita (Supra) and Janardan (Supra). In fact, I have accepted that reasoning but have distinguished the cases from the present one at hand. Bearing the repeatation, in both the said earlier cases of this Court on the point, it was clear that the first appellate Court had not applied its mind to the points urged before it and had not recorded its decision on the facts urged before it. On the other hand, in the present case, it was seen that the lower appellate Court had not only taken each and

every issue for discussion and has appreciated it properly which left no doubt that he had applied his mind to the facts and legal aspects involved in the case and, therefore, no prejudice was caused to the appellants and thus I am of the firm view that there is no reason whatsoever for referring the issue to the larger Bench at all.

8. Similarly, in **Lakshmi Ram Bhuyan's case (Supra)**, the Apex Court was basically dealing with the provision of Sections 152, Or.20 R.6, 6-A, 5 and 1 of C.P.C. The facts involved in the said case were regarding the operative part of the order passed by the lower appellate Court and it was observed that the decree shall agree with the judgment and operative part of the judgment shall be clear and precise so that in case objections are raised later, a bare reading of the judgment and decree would be enough to show whether the two agree with each other. Dealing with this issue, it was observed that Order 41 Rule 31 of the C.P.C. casts an obligation on the author of the appellate judgment to state the points for determination, the decision thereon, the reasons for the decision and decree appealed from is reversed or varied, the relief to which the appellant is entitled. In this regard, I must note

that there cannot be two opinions with regard to the ratio laid down by the Apex Court. However, the entire tenor of the judgment definitely shows that though the duty is cast upon the appellate Court to state the points for determination and the decision thereon, alongwith the reasons for the decision, it cannot be said that the said ratio is applicable to the present appeals at hand especially for the reasons I have already recorded to the effect that no prejudice is caused to the other party because every issue in dispute is taken up for discussion and has been appreciated properly which leaves no doubt that he has applied his mind to the facts and legal aspects. If this is so, in my considered view, the fact that detailed points for determination were not formulated, would amount only to irregularity which would not vitiate the proceeding especially when the body of the judgment shows that material compliance with the provision of Order 41 Rule 31 of the C.P.C. is made by the lower appellate Court.

9. Under the circumstances, I have no doubt whatsoever that the facts and legal aspects involved in these matters do not call for any review and, as such, both the review petitions deserve to be dismissed.

In the result, both the review petitions are hereby dismissed with no order as to costs.

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